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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 23

FILIPPO GIOVA, ETC.,

Petitioner,

vs.

GEORGE K. ROSENBERG, District Director of Immigration & Naturalization Service, Los Angeles,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

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Petitioner,

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GEORGE K. ROSENBERG, District Director of Immigration & Naturalization Service, Los Angeles,

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PETITIONER'S BRIEF

Statement of the Case

Petitioner was born on April 20, 1913 at Bari, Italy; entered the United States lawfully in the year 1920 when approximately 6 years of age, and has lived and resided in the United States since said entry except for the periods mentioned in this petition. Petitioner is now 49 years of

age, attended elementary and junior high school in the City of Los Angeles, and was married to Lena Smalding, a native born citizen of the United States, on July 2, 1933. Of this marriage three children were born, all citizens of the United States. Petitioner is the grandfather of six native born citizens of the United States. Petitioner and his wife have lived and resided together as husband and wife in the City of Los Angeles, except for the periods of separation as a result of petitioner's deportation from the United States as hereinafter detailed.

On June 8, 1946 petitioner was deported from the United States on the grounds that he had been twice sentenced for a term of one year or more for conviction in California of crimes involving moral turpitude, to wit: second degree robbery on July 15, 1935, and forgery on April 15, 1938, both of which sentences were served concurrently.

On November 7, 1948 petitioner reentered the United States as a stowaway and was excluded and deported therefrom on June 21, 1949. On October 21, 1952 petitioner reentered the United States at San Ysidro, California, and was deported from the United States in January of 1953. Petitioner reentered the United States and has resided therein since December 24, 1954, with his family, children and grand-children.

On April 2, 1957, petitioner was ordered deported from the United States under the provisions of section 242(f) of the Immigration and Nationality Act.

On June 30, 1959, plaintiff was granted a waiver of grounds of excludability under section 5 of the Act of September 11, 1957.

The District Director of Immigration at Los Angeles approved petitioner's application for advance permission

to reapply for admission to the United States after deportation on June 16, 1959, and on July 27, 1959 amended his order of June 16, 1959, as follows:

"Advance permission to reapply after deportation is granted following departure to Canada under an order of deportation and return under preexamination proceedings approximately in August, 1959."

On June 30, 1959, in a decision rendered by the special inquiry officer of the Immigration Service, it was determined:

"* * * that the evidence of record, including the independent investigation conducted by the Service, satisfactorily establishes that the applicant has successfully reformed and genuinely rehabilitated himself and that the applicant's admission to the United States would not be contrary to the national welfare, safety or security of this country. In the premises, a waiver of the ground of excludability is warranted, and, accordingly, consent will be granted the applicant to apply for an immigrant visa and for admission to the United States.

"ORDER: It is ordered that pursuant to the authority contained in Section 5 of the Act of September 11, 1957, permission is granted to apply or reapply for a visa and admission to the United States, notwithstanding his inadmissibility under section 212(a) (9) of the Immigration and Nationality Act arising from his convictions in California of robbery, second degree (1935) and forgery (1938) PROVIDED that such waiver shall apply only to the grounds of excludability herein discussed. It is further ordered that the applicant be found admissible to the United States when in possession of 'appropriate documents'".

That upon the granting of said waiver of excludability, petitioner did make his application for a visa to the United States Consulate at Vancouver, British Columbia, and thereafter on September 9, 1959, petitioner was advised by said Consulate that:

> "You are inadmissible to the United States under the provisions of section 223(a) (23) of the Immigration and Nationality Act",

and denied petitioner's application for a visa.

That on September 25, 1961, petitioner filed with the District Director of the Immigration Service at Los Angeles, his supplemental petition (1) to reopen proceedings; (2) for waiver of grounds of excludability under Section 5 of the Act of September 11, 1957, as amended; (3) for leave to file application for suspension of deportation; and (4) for stay of deportation.

That on November 3, 1961, the Board of Immigration Appeals made and entered its order denying petitioner's petition of September 25, 1961.

Petitioner appealed directly from this order to the Ninth Circuit Court of Appeals from the denial of his motion to reopen. The appeal was taken under the provisions of Public Law 87-301 (75 Stat. 650), 8 U.S.C.A. 1105a, effective September 26, 1961.

The Respondent's Brief to the Ninth Circuit hinted at lack of jurisdiction in the following language:

> "Under Public Law 87-301, 8 U.S.C. 1105(a), the United States Court of Appeals is granted jurisdiction to review final orders of deportation. In view of the uncertainty surrounding the question as to whether or not petitioner is appealing from a final order of de-

portation, respondent contends that this Court may lack jurisdiction under 87-301 (8 U.S.C. 1105(a)) to review and decide petitioner's appeal."

After argument before the Circuit, the Court *per curiam* Opinion determined as follows:

"PER CURIAM:

This court's jurisdiction is here invoked under the provisions of Public Law 87-301 (75 Stat. 650), 8 U.S.C.A. 1105a, effective September 26, 1961, which provides for 'the judicial review of all final orders of deportation'.

The sole deportation order presently outstanding with respect to this petitioner was made April 2, 1957. On September 15, 1957 the Board of Immigration Appeals dismissed petitioner's appeal from that order. The deportation order referred to above is still in full force and effect, and the record before us indicates it has never been revoked.

Petitioner did move to reopen the proceedings before the Board of Immigration Appeals. This request was denied November 3, 1961. Petitioner is now appealing directly to this Court from the denial of his motion to reopen; not from the order of deportation.

"(1) *We have no jurisdiction to hear this appeal. It is dismissed.*

"(2) We are tempted to discuss the merits of this case. But we cannot reach the rationale behind *Pino* v. *Nicolls*, 1 Cir. 1954, 215 F.2d 237 at 243, reversed per curiam, *Pine* v. *Landon*, 1955, 349 U.S. 901, 75 S.Ct. 576, 99 L.Ed. 1239, or the effect of the Attorney General's holdings in the Matter of A - - - -, 7 I. & N. Dec. 166; In the Matter of G - - - -, 5 I. & N. Dec. 129, for this court cannot give advisory opinions."

Statutes Involved

Public Law 87-301 (75 Stat. 650), 8 U.S.C.A. 1105a, effective September 26, 1961.

Section 1105a as amended by Public Law 87-301 (75 Stat. 650), 8 U.S.C.A. in part provides:

> "(a) The procedure prescribed by, and all the provisions of sections 1031-1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, . . ."

and

> "(c) . . . No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceedings, unless the petition presents grounds which the Court finds could not have been presented in such prior proceedings, or the Court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order."

QUESTION INVOLVED

The Sole Question Involved Is Whether a Refusal by the Attorney General to Consider Petitioner's (1) Application for Discretionary Relief to Permit the Filing of an Application for Suspension of Deportation; (2) Application to Reopen the Immigration Proceedings, (3) Waiver of Grounds of Excludability Under Section V of the Act of September 11, 1957, as Amended, and (4) for Stay of Deportation, After a Final Order of Deportation Has Been Entered—Is Reviewable Within the Jurisdiction of the Courts of Appeals or the District Courts of the United States.

Contention of the Petitioner

It is the petitioner's contention that the Circuit Courts of Appeals have exclusive jurisdiction to review orders by the Attorney General made subsequent to the entry of the final Order of Deportation.

Argument and Points and Authorities

The issue involved is solely one relating to the jurisdiction of the United States Courts, whether the review must be initially held before the Circuit or the District Courts. The merits of petition are not presented to this Court, nor are we concerned with the petitioner's deportability, since this question was determined many years ago.

It is our considered opinion that the instant matter comes within the ruling of this Court in *Foti* v. *Immigration Service*, 11 L.Ed. 2nd 281, the sole difference being that in *Foti*, the relief by the admittedly deportable alien was initiated during the deportation proceedings.

Giova filed his petition for discretionary relief subsequent to a final determination of his deportability and

the entry of the final Order of Deportation. The distinction between *Foti* and *Giova* is without substance. They are identical in that each is for a review from the denial of discretionary relief by admittedly deportable aliens.

The Immigration Service and the Board of Appeals had jurisdiction, in each instance, to consider the applications for discretionary relief. Having denied in each the relief sought, *Foti* determined that the Circuit Courts had exclusive jurisdiction by judicial review to determine deportability and denial of discretionary relief, and was within the ambit of Section 106(a). Giova's petition for judicial revew was denied by the Circuit on the grounds it had no jurisdiction. The Immigration Department had jurisdiction to hear and determine the requested discretionary relief in *Foti* and *Giova*. Judicial review as sought by Foti within the posture of the entire deportation proceedings, though not contesting his deportability, was held to be solely cognizable in review before the Circuit. It therefore follows as a necessary corollary in *Giova* that the Circuit had jurisdiction to determine the denial of discretionary relief made after the entry of the final Order of Deportation.

Giova's deportability is not in issue. However, if he be granted the discretionary relief prayed, it would affect the final Order of Deportation, for if the suspension of deportation be granted, the Order of Deportation would become moot. Consequently, a favorable determination of his petition for suspension of deportation would directly affect the Order of Deportation. Can it be said, with any degree of reasoning or logic, where judicial review is sought on the question of deportability and a denial of discretionary relief that judicial review must be sought from the Circuits on deportability and review before the

District Courts on the denial of discretionary relief? Such bifurcated proceedings would obviously be contrary to the intent of Congress in enacting §106a of the Immigration and Nationality Act. The basic purpose of this Section was to obviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts.

Foti determined:

"Review of the denial of discretionary relief is ancillary to the deportability issue, and both determinations *should therefore be made by the same court at the same time.* We realize that deportability is conceded in a large number of cases. But this fact hardly detracts from our view as to a proper interpretation of 106(a).

"In substance, we feel that the Court of Appeals was wrong in limiting the phrase 'final orders of deportation' in 106(a) to adjudications of deportability..."

and

"Also, it seems rather clear that all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to 244(e) and orders denying the withholding of deportation under 243(h), are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals under 106(a). We see nothing anomalous about the fact that a change in the administrative regulations may effectively broaden or narrow the

scope of review available in the Courts of Appeals. Furthermore, we do not regard it 'in the last degree unlikely' that Congress intended a court of three judges to initially review discretionary determinations denying suspension of deportation. Much of the litigation in deportation cases with respect to the setting aside of an administrative determination on the ground of arbitrariness involves disputed eligibility questions and matters of statutory construction. Additionally, the concern of the court below does not comport with the declared purpose of 106(a) to eliminate the District Court stage of the judicial review process in an effort to prevent dilatory tactics. *And the suggestion of the court below that it is 'incredible' that Congress meant to burden the Courts of Appeals with review of all orders denying discretionary relief in deportation cases is unconvincing.* Congress presumably realized that, in practical effect, those engaged in dilatory tactics would hardly hesitate to appeal to a Court of Appeals from an adverse District Court determination where discretionary relief had been denied in the administrative proceeding."

We respectfully urge that the holding by the Ninth Circuit that it was without jurisdiction to review the orders in this case was error.

Included within the purview of deportation proceedings are many related matters dealing with discretionary relief, voluntary departure privileges, Section 244(e); orders denying and withholding deportation under Section 243(h), hardship cases, and (3) orders denying applications for preference in immigration visas by concededly deportable aliens against whom final orders of deportation are outstanding.

Can it be said that the denial of any form of discretionary relief sought by the alien must be separately determined by the District Court from a determination by the Circuit on review of the Order of Deportation where such order is contested. In the footnote of *Foti* v. *Immigration Service*, we find the following pertinent language:

> "18. The court below manifested its concern that, if it were to find that it had jurisdiction in this case, the door would then be opened to the obtaining of review of a refusal to reopen a deportation proceeding in the Courts of Appeals. 308 F.2d, at 785. And the Government has argued in its brief that, although the question is a close one, an order refusing to reopen a deportation proceeding should be regarded as within the provisions of 106(a) with respect to judicial review in the Courts of Appeals, though occurring subsequent to the issuance of a final deportation order. Brief for respondent, pp. 51-56. Compare Giova v. Rosenberg, 308 F.2d 347 (C.A. 9th Cir. 1962), petition for cert. pending, No. 15 Misc. October Term, 1963. Cf. Dentico v. Immigration and Naturalization Service, 303 F.2d 137 (C.A. 2d Cir. 1962), holding that Courts of Appeals have exclusive jurisdiction to review denials of motions to reopen deportation proceedings, where review of a final order of deportation is sought at the same time."

We believe what has been said in this Court's Opinion in *Foti* is applicable to the instant proceedings, and shall not burden this Court with further argument.

We respectfully request reversal.

Respectfully submitted,

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